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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 212

CARLOS OVERTON,

Respondent,

vs.

THE STATE OF NEW YORK,

Petitioner.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE TERM, NINTH AND TENTH JUDICIAL DISTRICTS.

PETITION FOR REHEARING ON WRIT OF CERTIORARI

CARL A. VERGARI,
District Attorney of Westchester County,
Court House, White Plains,
New York 10601.
914 761—1144

By: JAMES J. DUGGAN,
Assistant District Attorney,
Of Counsel.

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Opinions Below

The decision of the Court of Special Sessions is unreported and appears in the Record at pp. 214-16. It is set forth in the Appendix to the petition for certiorari, pp. 19-21. The opinion of the Appellate Term is reported at 51 Misc. 2d 140 (1966) and appears in the Record at p. 242. It is set forth in the Appendix, p. 18. The opinion of the New York Court of Appeals is reported at 20 N. Y. 2d 360 (1967) and is set forth in the Appendix, pp. 13-17. This

Court in a decision of October 28, 1968, thus far unreported held:

> "The petition for a Writ of Certiorari is granted. The judgment of the Appellate Term of the Supreme Court of New York is vacated, and the case is remanded for further consideration in light of *Bumper* v. *North Carolina,* 391 U. S. 543. Mr. Justice Black dissents and would affirm the judgment of conviction here."

Grounds of Petition

The petitioner here (the respondent in the original petition for the writ of certiorari) grounds this petition on its belief and its respectful submission to the Court that the Court has misapprehended the decision of the New York Court of Appeals in this case. While on the one hand the Court of Appeals at 20 N. Y. 2d 363, Appendix, p. 15, held:

> "Not only have the school authorities a right to inspect but this right becomes a duty when suspicion arises that something of an illegal nature may be secreted there. When Dr. Panitz learned of the detectives' suspicion, he was obligated to inspect the locker.",

this Court, on the other, by its allusion to *Bumper* v. *North Carolina,* 391 U. S. 543, seems to suggest that the search conducted here derives its authority not from that independent right of Panitz to search on his own authority, but from his consent to the mandate of the warrant.

Certificate

James J. Duggan, Assistant District Attorney of Westchester County, appearing herein of Counsel to Honorable Carl A. Vergari, District Attorney of Westchester County,

New York, does hereby certify that the within petition is presented in good faith and not for delay, and he further certifies that this petition is restricted to the grounds above specified.

/s/ JAMES J. DUGGAN

Reasons for Granting the Petition

As was pointed out in the Statement in our Brief in opposition to the issuance of the writ (Respondent's Brief, pp. 3-4), the Court of Special Sessions of the City of Mount Vernon vacated the search warrant but withal sustained the search as being properly within the vice-principal's own authority. That determination was reversed in the Appellate Term of the Supreme Court on the theory that the student's right of access to the locker was exclusively his. The Court of Appeals, to which the district attorney appealed that ruling, said, first, that the school administration had the right to consent to the search of the locker, and second, that the vice-principal had an independent, affirmative obligation to search the locker if his investigation of reported possession of narcotics so indicated.

Thus, if *Bumper* is read to stand for the harshest rule possible, i.e., that non-consent is to be irrefutably presumed from the presentation to the supposed consenter of an invalid search warrant, a suggestion which Mr. Justice White rejected in *Bumper* v. *North Carolina, supra,* that only serves to annul one of the two grounds on which the Court of Appeals held this search permissible. That being so, as the Appellate Term on the remand from the Court of Appeals was not at liberty to disregard either of the criteria of the lawfulness of this search set down by the Court of Appeals (as a matter of fact, the Appellate Term never again reviewed that point in affirming the conviction here), so it will not now be at liberty on remand

from this Court to disregard the clear ruling of the Court of Appeals that Panitz had a right to search the locker which was altogether unrelated to the warrant.

In consequence of all this, and we mean this in no critical sense, this Court in remanding the case has given no meaningful advancement to the resolution of the central question it presents. The Appellate Term will almost surely re-affirm this conviction, and, considering the time and effort which he has already expended in this case, it is probably fair to say that the respondent will appeal such a ruling. Surely the People of the State of New York will appeal any other, and the matter will once again be placed before the New York Court of Appeals. There is no reason to anticipate that they will abandon that portion of their view of the case which is not governed by *Bumper,* and, having once recognized Dr. Panitz' unconditioned right to search the locker, they will no doubt reconfirm it. Hence in a year or two or three at most this Court will again be called upon to decide whether in fact that right exists as a proper adjunct to school administration. The Court is therefore earnestly requested to withdraw its vacatur of the judgment of the Appellate Term and its remand to that Court, and to order a full argument directed towards the dual question of whether Dr. Panitz had his own authority to search and of whether it may realistically be argued that a public official who is already under a duty to search is "compelled" further to do so by a defective search warrant.

If we examine first the proposition that Dr. Panitz had the right to search the locker whether he was shown a warrant or not, the Court's attention is respectfully directed to the scholarly opinion of the United States District Court for the Middle District of Alabama in *Moore* v. *Student Affairs Committee of Troy State University,* 284 F. Supp. 725 (1968). There, the Court has exhaustively treated and documented the relative rights and duties of a

modern university and a dormitory resident student. In that case, the Dean of Men at the University was called to a conference at the office of the Chief of Police of Troy, Alabama. This meeting was attended, along with the Dean and the Chief, by two narcotics agents and two students. It was suggested, with what reliability is unknown and for our present purposes may remain so, that marijuana would be found in a search of certain dormitory rooms. Acting upon this information, the Dean and the two narcotics men searched, among others, Moore's room and found marijuana. The District Court sustained the validity of the search as a proper exercise of the school's supervisory responsibility and said, at page 729:

> "A student naturally has the right to be free of unreasonable search and seizures, and a tax-supported public college may not compel a 'waiver' of that right as a condition precedent to admission. The college, on the other hand, has an 'affirmative obligation' to promulgate and to enforce reasonable regulations designed to protect campus order and discipline and to promote an environment consistent with the educational process. The validity of the regulation authorizing search of dormitories thus does not depend on whether a student 'waives' his right to Fourth Amendment protection or on whether he has 'contracted' it away; rather, its validity is determined by whether the regulation is a reasonable exercise of the college's supervisory duty. In other words, if the regulation—or, in the absence of a regulation, the action of the college authorities—is necessary in aid of the basic responsibility of the institution regarding discipline and the maintenance of an 'educational atmosphere,' then it will be presumed facially reasonable despite the fact that it may infringe to some extent on the outer bounds of the Fourth Amendment rights of students."

We cannot argue that this case is not, at least superficially, distinguishable from the matter now before the Court. The first and most apparent distinction is that *Moore* involved disciplinary proceedings as opposed to criminal prosecution. The second is that *Moore* dealt with a resident college student as opposed to a nine-to-three high school boy, but the principle is nonetheless the same.

That, in fact, raises another point. *Moore* set down guidelines for students at the collegiate level, and this case was treated by the New York Court of Appeals as having special pertinency to high school pupils. There is, though, no substantial basis upon which to conclude that, at whatever level of scholastic achievement, new rights attach or old ones vanish. There is an old philosophical conundrum of how many stones make a pile. Regardless of the answer, the questioner asks whether, if one stone is removed, what remains is still a pile. This process is repeated stone by stone until the squirming victim is forced to say that what was a pile has become, by the removal of a single stone, less than a pile. Then comes the coup de grace; that last stone is placed back with the others and the "pile" is reconstituted. So it is with the student. It is all well and good to say that at the high school or college level certain standards apply, but those standards must be virtually identical because there is no sound basis of distinction between the high school senior and the college freshman. The same observation may be made of the progression from grammar school to high school. If in June a child is one thing, it is naive to think that in September he is going to be something else just because he has advanced one grade. Therefore, to turn this back to the point, the disciplinary prerogatives enjoyed by university administrators must be available in at least equal measure to administrators of primary and secondary schools. Perhaps they should even be available to such administrators in larger measure in view of the fact that students of these

schools are less mature and hence more greatly in need of supervision than are collegians, but certainly no responsible argument can be made that such officials are less entitled to utilize the necessary and approved tools of maintaining orderliness among large groups of children. Consequently, however the *Moore* case can be distinguished from this one, its underlying philosophy cannot be.

The Court's attention is also respectfully directed to *United States* v. *Donato,* 269 F. Supp. 921, 923 (E. D. Pa. 1967), affirmed 379 F. 2d 288 (3d Cir. 1967), cited by the *Moore* court. That case, though factually dissimilar to this one, poses a parallel problem and a reasonable answer which has obvious application to the instant case.

It is therefore submitted that Dr. Panitz possessed full authority of his own to search the locker, an authority he had made full use of before and was fully prepared to use again (Record, p. 93). In having omitted to rule on this point this Court has, it is submitted, relieved the New York State courts of any necessity of referring to *Bumper* v. *North Carolina, supra,* in deciding this case.

We would turn, then, to the second question we have suggested this Court ought to decide and that is, of course, the applicability of the *Bumper* rule to the situation where the person consenting to the search is a public official who is himself under an affirmative duty to search. It is submitted that in light of the decision of the New York Court of Appeals in this case and that of the District Court in *Moore* v. *Student Affairs Committee of Troy State University, supra,* it is unarguable that Dr. Panitz had the authority and the obligation to inspect school lockers, and even the respondent doesn't disagree with this (cf. Petition for Certiorari, p. 10). With a warrant, therefore, or without one, Panitz was required to search Overton's locker upon receiving information that narcotics were concealed there. Thus, one is entitled to wonder of what force

the warrant was, aside from communicating to Panitz the probability that a search would reveal such narcotics.

In the *Bumper* case, the person who consented to the search was, of course, Bumper's grandmother. Given the normal relationship between such people, it is obvious that she was attempting to protect him. Significantly, she believed a search was in his best interests, because she believed he was innocent, *Bumper* v. *North Carolina*, 20 L. Ed. 2d 797 at 802, n. 8. Differently stated, Mrs. Leath's primary, overriding concern was Mr. Bumper's well being. It simply is not to be credited that anything she did could be calculated to do him harm. Consequently, when the four police officers appeared with a search warrant, it is reasonable to suppose that her first inclination should have been to resist it, if not by force then at least by protesting against the search being conducted. At a matter of fact, the only consideration in *Bumper* which lends any authenticity to the State's claim that she consented is her belief in the boy's innocence. In no event, however, may it be argued that Mrs. Leath was in any sense required to assist the police except to the extent that she was commanded to do so by the warrant. Most assuredly she would not herself have conducted a search if the police had not done so. This Court ruled, and quite properly so, that this search was coerced.

The word "coerced" is defined in Webster's Third New International Dictionary, p. 439, col. 1, as:

> "1. to restrain, control or dominate, nullifying individual will or desire (as by force, power, violence or intimidation);
>
> 2. to compel to an act or choice by force, threat or other pressure;
>
> 3. to effect, bring about, establish or enforce by force, threat or pressure."

Assuredly all of these definitions apply to what occurred at the Leath home, because the unarticulated premise of all three is that, save for the restraint, control, domination, compulsion, etc., the ensuing act, i.e., the search, would never have taken place, and, as we have attempted to show, that is the fact.

But may the same conclusion be drawn from the events at Mount Vernon High School on December 21, 1964? It is submitted that it may not, for there the requirements of what we have called the unarticulated premise were not met, for undeniably the search would have taken place anyway. There was, therefore, no coercion as Webster's defines it. Whereas Mrs. Leath held paramount the safety of her grandson, Dr. Panitz' primary motivation was the discipline and good order of the whole school, and the security and health of the entire student body. To the extent to which Overton represented a threat to the school or the student body, any consideration due him as a student became secondary to Dr. Panitz' larger purpose. So, where Mrs. Leath may have been coerced into allowing a search, it is almost self-evident that Dr. Panitz was not, because no necessity for coercing him appears.

No question would have arisen in this case as to coercion if the detectives had simply come to Dr. Panitz and confided to him that they had information that narcotics were being secreted in Overton's locker. If he had then searched the locker, and who can doubt that he would have done just that, there would be no argument; it would have been an administrative search. Simply the fact of their having with them a search warrant, it is submitted, only beclouds an otherwise straightforward issue, and in effect it makes gossip and rumor more satisfactory gauges of reliability than the sworn affidavit which accompanied the warrant.

Finally, there is at least grave doubt that Dr. Panitz paid all that much attention to the warrant in searching the locker. It must be remembered that Overton admitted *in*

Panitz' presence that he had narcotics in his locker (Record, p. 47) and, as the Court pointed out in *Moore* v. *Student affairs Committee of Troy State University, supra,* page 728 n. 3, such an admission might well have constituted sufficient grounds to arrest him, citing *McCray* v. *Illinois,* 386 U. S. 1042, let alone encourage a conscientious school official to perform his duty and seize those narcotics.

CONCLUSION

For the foregoing reasons the Court should withdraw its vacatur of the judgment of the Appellate Term and direct a full argument.

Respectfully submitted,

CARL A. VERGARI,
District Attorney of Westchester County.

By: JAMES J. DUGGAN,
Assistant District Attorney,
Of Counsel.

November 12, 1968.